1948

# Faye Walker Osmus v. Harry Osmus : Brief of Appellant

Utah Supreme Court



C. Vernon Langlois; Attorney for Defendant and Appellant; Ray S. McCarty; Of Counsel

Case No. 7152

# IN THE SUPREME COURT
## of the State of Utah

FAYE WALKER OSMUS,
*Plaintiff and Respondent,*

vs.

HARRY OSMUS,
*Defendant and Appellant.*

## BRIEF OF APPELLANT

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## BRIEF OF APPELLANT

### I.

### Statement of the Case

This is an appeal from an order of the Honorable J. Allan Crockett, one of the judges of the District Court of Salt Lake County, holding the defendant in contempt for failure to abide by a decree of this court for payment of alimony and support money as provided in a decree of divorce heretofore entered in the above entitled cause, and also an appeal from the order of the same judge in the same cause refusing to grant defendant's petition for modification of said decree.

On March 14, 1947, the plaintiff filed her complaint asking for a decree of separate maintenance from the

defendant, and asking for the custody of Colleen Osmus, born December 22, 1940; Diane Osmus, born July 24, 1942; and Darryl Osmus, born April 3, 1946; and praying for $350.00 per month alimony and maintenance money for the children; and that summons thereupon issued. (R. 1-4)

That on July 15, 1947, counsel for plaintiff and counsel for defendant entered into a written stipulation stipulating that the court make a temporary order granting to plaintiff the sum of $100.00 per month as temporary support money for herself and children, to be paid at the rate of $25.00 per week beginning on the date of the order, and further ordering the defendant to pay to plaintiff's attorney $50.00 on or before August 1, 1947. (R. 7) That on July 15, 1947, the Honorable Roald A. Hogenson signed an order pursuant to the above stipulation. (R. 6)

That on July 21, 1947, the defendant herein filed his answer to plaintiff's complaint and a counterclaim (termed "cross-complaint") wherein he asked for a decree of divorce against the plaintiff. (R. 9-13) That thereafter, to-wit, on the 29th day of August, 1947, the plaintiff herein filed her reply to defendant's answer and her answer to defendant's counterclaim. (R. 14-15) That later, to-wit, on the 29th day of August, 1947, the plaintiff herein filed an amended complaint asking for a decree of separate maintenance and for the sum of $350.00 as alimony and support money, together with attorney's fees. (R. 16-20) That thereafter, to-wit, on the

7th day of October, 1947, the plaintiff herein filed her second amended complaint in the above action, wherein she asked for a decree of divorce from the defendant, and that she be awarded custody of the three minor children, and the defendant to pay her $250.00 per month. (R. 22-26) That on October 7, 1947, the entry of appearance and waiver of the defendant was filed, which provided that he entered his appearance in the case and consented that his default be entered forthwith upon the condition that the alimony and support money awarded should not be more than the total amount of $250.00 per month.

That on the 7th day of October, 1947, the plaintiff herein appeared before the Honorable J. Allan Crockett, and the default of the defendant being entered by reason of his appearance and waiver, the court heard the evidence and made its Findings of Fact, and among other things found as follows:

> "4. The plaintiff and defendant formerly resided at 1631 Kensington Avenue, Salt Lake City, Utah, at which address a home was being purchased on contract by and on behalf of this plaintiff for the sum of $10,750.00. That approximately $1,200.00 had prior to February, 1947 been paid upon said contract, but that since that date the defendant failed to make the contract payments, that the contract became in arrears, that plaintiff had no income from which to make the payments on said contract, was threatened with cancellation of said contract, and sold said home and said contract and received for her equity the sum of approximately $5,000.00." (R. 29)

"5. That the defendant is an able bodied man of 39 years of age, is a capable manager of eating establishments and has been over a long period of time, through sharing profits in the business, earning an average of at least $850.00 per month and is now capable of earning $500.00 per month." (R. 30)

"7. That during all of the times herein stated, this plaintiff has been a devoted wife and mother, and has spent her time exclusively in the care of her family. That she has no other or independent income, but is entirely dependent upon the defendant for the maintenance of herself and children. That Colleen, the eldest child of plaintiff and defendant, is now and has been for some time suffering from a rheumatic heart condition requiring a great deal of care by this plaintiff.

"8. That this plaintiff has carefully calculated the necessary expenses for the operation of the household of plaintiff and defendant, for the care, feeding and clothing of herself and the children of plaintiff and defendant, and has determined that with strict economy $250.00 is the least possible amount from which she could pay said expenses. That this amount does not include drugs, medicines, and medical care for the child, Colleen, afflicted with rheumatic heart condition." (R. 31)

Thereupon, based upon the Findings of Fact and Conclusions of Law, the court entered its Judgment and Decree of Divorce on the 7th day of October, 1947. That in addition to providing for an interlocutory decree of divorce for plaintiff, the decree provided:

"2. That plaintiff have custody of the three minor children of plaintiff and defendant, Colleen Osmus, Diane Osmus and Darryl Osmus, with right of defendant to visit said children at reasonable times.

"3. That plaintiff have and is hereby awarded the sum of $250.00 per month to be paid to the plaintiff by the defendant as alimony and support money for plaintiff and the children of plaintiff and defendant, $100.00 as alimony to plaintiff and $50.00 each to the children as support money, the first payment in said amount of $250.00 to be made by defendant to plaintiff within ten days from the entry of this decree.

"5. That this court retain jurisdiction of this cause for all purposes which may to the court seem proper in the interests of the children of the plaintiff and defendant." (R. 33)

That on the 19th day of December, 1947, the plaintiff herein filed an affidavit setting out that on July 15, 1947, the above court had entered its order ordering defendant to pay plaintiff as temporary support money the sum of $25.00 per week until further order of the court, and to pay her attorney the sum of $50.00 as attorney's fees, and further, on the 7th day of October, 1947, the court entered its decree granting the plaintiff a divorce, custody of the three minor children, and ordering defendant to pay plaintiff the sum of $250.00 per month as support money and alimony for plaintiff, and alleging that defendant had paid nothing except $50.00, leaving a balance due and owing of $723.26. That said affidavit alleged that defendant is an able-bodied man, steadily

employed, and capable of complying with the order of the court, and praying for an order directing defendant to appear and show cause why he should not be punished for contempt of court, and why he should not pay the plaintiff what was due her, and for additional attorney's fees. (R. 39) That pursuant to said affidavit, the Honorable J. Allan Crockett, one of the judges of the above entitled court, entered an order ordering defendant to appear on Monday, the 22nd day of December, 1947, to show cause why the court should not make its order herein punishing the defendant for contempt of court, and why the defendant should not be compelled to pay plaintiff what was owing her, together with an attorney's fee. (R. 37) That said order was duly served on the defendant herein by the Sheriff of Salt Lake County. (R. 41)

That on December 22, 1947, the defendant filed his petition for modification of decree, wherein he set forth that he is now, and ever since the decree was entered was, actually earning less than $100.00 per month, and is incapable of earning in excess of $40.00 per week, and was at the time the decree was entered earning less than $100.00 per month, and has been earning less than $100.00 per month since the 15th day of February, 1947. Defendant denied that he was in contempt of court, and affirmatively alleged that he had paid $50.00 to the plaintiff since the decree was entered, which was a sum far in excess of his ability to pay from his earnings, but that said sum was borrowed. Defendant also alleged that if he were given four or five months respite from any payments, he

would be able to make payments to plaintiff of approximately $25.00 per week, but that it was impossible for him at that time to make any payments whatsoever. (R. 42-43)

That on December 22, 1947, the parties hereto appeared before the Honorable J. Allan Crockett. Whereupon, plaintiff and defendant were sworn and examined, and Theo Carlson was sworn and examined, and documentary proof was received in evidence, and the court thereupon made his Findings of Fact and Conclusions of Law, as follows:

## FINDINGS OF FACT

"1. That on the 7th day of October 1947 the court made and entered its decree in the foregoing action, granting to the plaintiff a divorce from the defendant; granting to the plaintiff the care, custody and control of three minor children, issue of said marriage, and ordering the defendant to pay to the plaintiff the sum of $250.00 per month as permanent alimony and as support money for said children.

"2. That prior to the entry of said decree and on or about the 15th day of July 1947, while said action was pending, the court made and entered its order in said action requiring the defendant to pay to the plaintiff the sum of $25.00 per week, from said date, as temporary support money pending said action and the sum of $50.00 attorney's fees for the use and benefit of her attorney therein.

"3. That the defendant has paid nothing to the plaintiff under the terms of said decree or

otherwise, or under the terms of the order of the court for temporary support money and attorneys fees, except the sum of $50.00, and that there is due and owing to the plaintiff from the defendant under the terms of said order and decree of the court the sum of $723.26, no part of which has been paid.

"4. That the award of $250.00 per month payable to the plaintiff by the defendant by said decree of divorce, was entered by the court pursuant to stipulation of the defendant, through his attorneys, which stipulation is on file and of record herein.

"5. The court further finds from the evidence introduced that the defendant is and was able-bodied, since the entry of the said order of the court and the decree of the court herein referred to and has been and now is capable of earning a sufficient amount to provide a substantial sum for the support of his former wife and his children, and that his earnings in the past has been as high as $800.00 per month as a cook, and that he is still able, with a reasonable effort to earn sufficient to comply with the terms of said decree, but disregarding the order of the court and decree herein, has wilfully failed to do so, but instead thereof has wilfully failed and neglected to find employment or seek employment or earn money with which to meet his obligations under said decree; that said defendant has attempted to justify his failure to comply with the order and decree of the court, by testifying that he is working for his board and room for a Mrs. Carlson, who has promised him an interest in her business of operating a lunch stand which the court finds is not a reasonable explanation

of his failure to support his family and is a wilful evasion of his obligations.

"6. That the plaintiff and her children are dependent and have no income, except that supplied to them by the Salt Lake County Public Welfare Department.

"7. That $25.00 is a reasonable attorney's fee to allow plaintiff for the use and benefit of her attorney herein.

"8. That the defendant, by his evidence and by his petition for modification of said decree has shown no justifiable change of circumstances, since the entry of said decree herein to justify the court granting him any relief thereby.

"From the foregoing findings of fact the court now makes and enters the following:

CONCLUSIONS OF LAW

"That the defendant by his wilful failure to comply with the order and decree of the court is guilty of contempt of court and should be punished therefor.

"That the defendant is not entitled to any relief by modification of the decree of the court and the same should be denied." (R. 46-48)

and the court thereupon made its order as follows:

"IT IS THEREFORE ORDERED ADJUDGED AND DECREED, that the defendant be and he is hereby adjudged in contempt of court for his wilful failure to comply with the order and decree of the court heretofore entered in said action and is hereby sentenced to be confined in the County Jail of Salt Lake County for

a period of twenty-five days commencing with the 26th day of December 1947.

"IT IS FURTHER O R D E R E D, ADJUDGED AND DECREED, that the defendant pay to the plaintiff, until the further order of the court, one-half of his earnings, less proper deductions, to apply on current and past obligations to the plaintiff under the order and decree of the court, and that she have judgment for the sum of $25.00 for the use and benefit of her attorney herein in these proceedings.

"IT IS FURTHER O R D E R E D, ADJUDGED AND DECREED, that the petition of defendant to modify the decree of divorce herein be and the same is hereby denied." (R. 49)

That thereafter, within the time required by law, the defendant appealed to the Supreme Court of the State of Utah from the order finding the defendant in contempt and sentencing him to serve twenty-five days in the county jail, and the order denying defendant's petition for modification of decree.

## Statement of Facts

Plaintiff and defendant were married at Kingman, Arizona, on March 20, 1940, and from that union three children were born; Colleen Osmus, born December 22, 1940; Diane Osmus, born July 24, 1942; Darryl Osmus, born April 3, 1946. (R. 1)

This marriage was not destined to last, and the plaintiff on March 14, 1947, commenced the first of her actions against the defendant—a suit for separate maintenance, set forth in the Statement of the Case, supra.

On July 15, 1947, the parties entered into a stipulation whereby the defendant agreed to pay to plaintiff $100.00 per month as alimony and support money, payable $25.00 per week, and the further sum of $50.00 for attorney's fees. Judge Hogenson signed and filed such an order on the 15th day of July, 1947. (R. 6)

The defendant did not comply with this order, and only paid $50.00 to the plaintiff some time in October, 1947. On August 29, 1947, plaintiff filed her amended complaint, still praying for separate maintenance, wherein she prayed for $350.00 alimony and support money. (R. 16-20) On October 7, 1947, plaintiff filed her second amended complaint, wherein she prayed for a divorce and the sum of $250.00 per month, (R. 22-26) and on the same day the appearance and waiver of the defendant was filed (which was signed September 13, 1947), which contained the provision "that the alimony and support money to be awarded shall not be more than the total amount of $250.00 per month." (R. 27) On October 7, 1947, the plaintiff was awarded a decree of divorce granting plaintiff $100.00 per month and $50.00 per month support money for each of the children, or a total of $250.00 per month. The decree made no provision for costs or attorney's fees. (R. 33)

At the hearing before the Honorable J. Allan Crockett on December 22, 1947, on plaintiff's order to show cause and defendant's petition for modification, evidence was adduced as follows:

The defendant, Harry Osmus, was and always had been a fry cook, and that since the latter part of May, 1947, he has been rooming with and working for Mrs. Theo Carlson, who operates a restaurant at 6373 South State Street, Salt Lake City, Utah, and that he was working for board and room, and that he had no interest in the cafe whatsoever, and that he went to work for her about May 16, 1947. (R. 55-57) That prior to that time, that is, up until February 15, 1947, he had worked for a Mr. D. F. Anderson, who operated Dee's Hamburger Stand in Salt Lake City, and that he earned around $800.00 per month while working for Mr. Anderson, but that his employment ceased with Mr. Anderson on February 15, 1947. (R. 57) That between February 15th and May 16, 1947, the defendant had not worked at all. That he went to Vernal, Utah, and stayed with his brother for about five or six weeks, and he could not find a job there. That he did not make an effort to get a job as a fry cook in Salt Lake City because, if he started working for wages, people that had bills and judgments against him would garnishee his pay. (R. 58) That defendant went to work for Mrs. Carlson, and he was eventually to get an interest in her business—in fact, a one-half interest— when she got the place paid for, and it was on a paying basis. That at that time she still owed approximately $125.00 on the inventory. The defendant was fry cook and did the cleaning up for Mrs. Carlson, and in addition to board and room he got a few dollars spending money, a total of less than $1.00 per day. That Mrs. Carlson had bought him one suit since the divorce.

The defendant testified that his attorney in the original divorce (a different attorney than the writer) advised the defendant to sign a waiver and consent to the $250.00 alimony, and that later they could go back into court and cut the payments down to what he could pay. That he was not in court at the time of the divorce. (R. 62)

Upon cross-examination Mr. Osmus testified that Mrs. Carlson had put up all of the money for the purchase of her cafe. That she had not been able to get her investment out of it. (R. 62) That the defendant had worked from 9:00 a.m. until 1.00 a.m. with the hope and expectation of getting an interest in the business, and hoped to build the business up so it would be more profitable than working for wages. That at his job as fry cook he could only earn $8.00 per day, and if he joined the union, he would only work five days a week and make a total of $40.00 per week, and he felt he could do better by staying with Mrs. Carlson and getting a half interest in her business. (R. 64) Defendant was also fearful that if he took a job he would be garnisheed on account of the bills that were outstanding against him, and that all of these bills were contracted by the plaintiff since her separation from him. (R. 63-64)

The defendant also injured his shoulder about the 7th of December and has been going to the doctor for treatments and on account of his injury is unable to help Mrs. Carlson, and in fact, has spent most of the time in bed. Defendant testified that he was further afraid that

if he took a job his wages would be garnisheed. The judge at that time made some remarks that judgments had been entered, and he wanted to know what the judgments were. Defendant asked the court if bills turned over to attorneys for collection were judgments; whereupon, the court stated:

> THE COURT: Let's not bother about giving you a legal education. If you know what they are tell us; if you don't—

Defendant then stated he owed the power company $19.00, the telephone company $30.00, Red Feather Oil Company $80.00, a milk bill of $40.00, a furniture bill of $77.00, two doctor bills of $60.00 each, or a total of $120.00, and a number of the bills had been placed with the credit bureau for collection.

At the time the divorce decree was entered for $250.00 a month alimony, defendant was working at the same job he was at the time of the hearing. (R. 66-67) At the time of making $800.00 a month from Dee's Hamburger, he was managing the place on a percentage basis, and Mr. Anderson terminated that employment on the 15th of February, 1947, twenty-seven days prior to the commencement of the original action for separate maintenance.

In July, defendant offered to pay his wife $100.00 per month if she would consent to a divorce on that basis, but she said she would get $200.00 or know the reason why, and she would get every dime defendant ever made; however, the stipulation and order of July 15, 1947, pro-

vided for $100.00 per month temporary alimony and support money.

The defendant knew that Mrs. Osmus sold the home for $13,750.00 and there was around $8,400.00 due on it; that she realized approximately $5,000.00.

Mrs. Osmus testified that she now lives at 2589 Elm Avenue, Salt Lake City, Utah, with her three children, and that she is now living on the help of the Welfare. That the three children were too young to be left alone, and she was not able to leave them or to work, and she had to stay with them. She testified that in November the County Welfare Department gave her $80.00, and in December $129.00, and that that covered her living expenses, rent, and bills. (R. 75) That at the time of the divorce she and her husband owned a very substantial home, and that she sold the equity for $5,000.00, and that she purchased a home in September and paid $2,000.00 on it, and that the payments on the home are $55.43 a month. That prior to the time she bought the home she lived at the New Ute Hotel. That with the aid of the Welfare she is able to make the payments on the home. (R. 76-78) Mrs. Osmus spent the $3,000.00 over and above the down payment of the house during the four-month period she lived in the New Ute Hotel, prior to moving in her new home. She said she paid $5.00 per day for the hotel room and $25.00 a week for someone to take care of one of the small children. Part of the time she paid her sister and part of the time to her sister-in-law, Mrs. Reid Walker, for this work. The court thereupon ob-

served that the divorce was granted on the 7th day of October, 1947, and that the house was bought and all the money was spent by about the 1st of September, 1947. The court made the following observation:

> THE COURT: I have been talking all morning about the fact that this divorce was granted on the 7th of October. From anything I now see, the house was bought, all the money was spent by about the first of September, but if you can show me some reason why this is material, I will listen to it because we have had a good deal of this back of the divorce. I thought we would try to confine ourselves to the matters that transpired since the divorce happened. (R. 83-84)

Then again:

> THE COURT: Fact — let's assume, even from the tenor of your cross examination, she was unwise and improvident about spending it, which it would be my judgment that spending $3,000 in four months' time would be lacking in proper management, that wouldn't do you much good if merely dissipated foolishly.
>
> MR. LANGLOIS: Unless show some hidden some place.
>
> A. There is no money hid any place.
>
> The Court: Well, of course you are entitled to investigate that, if you want to show that she has, or ought to have, some available to cover this period since October 7 when Mr. Spence is wanting the defendant held in contempt for not paying. (R. 84)

The plaintiff then testified she bought the children's clothes, paid some money to moving companies and for storage. On questioning by the court, Mrs. Osmus testified that she moved in her new home on the 15th of September, and that she had sufficient money after buying the home to live on until she asked for welfare aid in November. (R. 85) By "enough" she testified she meant that she had about $200.00 left and she paid rent and bills and the Family Service gave her $10.00 in October. That she had a little girl that developed Perthes' disease, and that she had to wear a brace on her leg. Mrs. Osmus testified she got $50.00 from Mr. Osmus in October. (R. 87)

Mrs. Theo Carlson testified she operated a drive-in cafe at 6373 South State Street, and that ever since the defendant parted from his wife he had worked for her. She had not paid him any wages, but would give him a half interest if and when the place operated profitably and she recovered her original investment. She stated that for the past few months she had not made any profit at all, that she had paid him spending money, not exceeding $1.00 a day, and that she had given him board and room. (R. 87-91) That there were profits from the month of October of $149.50, and for November $106.55, and that her food and the food for defendant were taken from the business and treated as part of the business operation. (R. 91) That the business was good in June and July, 1947, and that the profits had run $400.00 per month, but that the profits had been put back in the business. That she expected the summer business of 1948 to be very good. (R. 92-94)

## ASSIGNMENTS OF ERROR

The defendant makes the following assignments of error:

I.

The court's Finding of Fact No. 5 was contrary to and unsupported by the evidence, which finding reads as follows:

> "The court further finds from the evidence introduced that the defendant, is and was able-bodied, since the entry of the said order of the court and the decree of the court herein referred to and has been and now is, capable of earning a sufficient amount to provide a substantial sum for the support of his former wife and his children, and that his earnings in the past has been as high as $800.00 per month as a cook, and that he is still able, with a reasonable effort to earn sufficient to comply with the terms of said decree, but disregarding the order of the court and decree herein, has wilfully failed to do so, but instead thereof has wilfully failed and neglected to find employment or seek employment or earn money with which to meet his obligations under said decree; that said defendant has attempted to justify his failure to comply with the order and decree of the court, by testifying that he is working for his board and room for a Mrs. Carlson, who has promised him an interest in her business of operating a lunch stand which the court finds is not a reasonable explanation of his failure to support his family and is a wilful evasion of his obligations."

II.

The court erred in its failure to make a finding that defendant under the evidence was entitled to a modification of said decree in respect to the lowering of said alimony and support money.

III.

The court erred in adjudging defendant in contempt of court for defendant's failure to comply with the order and decree of said court.

IV.

That the court erred in denying defendant's petition for modification of the decree of divorce.

## ARGUMENT

The defendant relies upon each of the assignments of error above set forth, and will consider the assignments in the following arguments consisting of two different points:

### POINT 1.

THE COURT'S FINDING NO. 5 WAS CONTRARY TO AND UNSUPPORTED BY THE EVIDENCE, AND THE COURT WAS NOT JUSTIFIED IN ADJUDGING THE DEFENDANT IN CONTEMPT OF COURT FOR HIS FAILURE TO COMPLY WITH THE ORDER AND DECREE OF COURT. (Assignments Nos. 1 and 3.)

The defendant was found in contempt for failure to comply with Paragraph 3 of the decree of divorce entered on October 7, 1947, by the Honorable J. Allan Crockett, which paragraph reads as follows:

> "3. That plaintiff have and is hereby awarded the sum of $250.00 per month to be paid to the plaintiff by the defendant as alimony and support money for plaintiff and the children of plaintiff and defendant, $100.00 as alimony to plaintiff and $50.00 each to the children as support money, the first payment in said amount of $250.00 to be made by defendant to plaintiff within ten days from the entry of this decree." (R. 33)

At the time of the hearing on December 22, 1947, the defendant was in arrears the $250.00 payments for October, November and December, a total of $750.00. There is absolutely no evidence in the record that during the months of October, November and December he was able or capable of paying any amount whatsoever on the judgment.

The rule has been laid down in practically all jurisdictions that the inability of an alleged contemner, without fault on his part, to render obedience to an order or decree of court is a good defense for disobedience of the order or decree.

Note, 22 A.L.R. 1256
Note, 31 A.L.R. 649
Note, 40 A.L.R. 546
Note, 76 A.L.R. 390
Note, 120 A.L.R. 703

In the case of *Hillyard v. District Court* (1926), 68 Utah 220, 249 P. 806, Judge Gideon said:

> "Under the authorities cited and the uniform holdings of the courts, it is prerequisite in contempt proceedings of the nature here under review to an order committing to jail that the one charged should be found able to comply with the court's order, or that he had intentionally deprived himself of the ability to comply with such order."

Of course, the above authorities hold that an inability to pay alimony brought about by the defendant's own acts for the purpose of avoiding its payment may be punished for contempt, or, stating it in the way of American Jurisprudence, Vol. 17, page 510, section 671:

> "In practically all jurisdictions it is held that a husband who is unable to obey a decree for the payment of alimony will not be adjudged in contempt for not obeying such decree unless he has voluntarily created the disability for the purpose of avoiding such payments."

In the case of *Watson v. Watson,* 72 U. 218, 269 P. (2) 775, the lower court found:

> "Defendant has earned sufficient wages to pay said alimony but defendant has wilfully refused to pay said alimony and this court finds that said defendant is in contempt of court for wilfully refusing to pay said alimony."

The finding was sustained by the evidence; however, the court sentenced him to jail until he paid $600.00 delinquent alimony. The court did not find he had the ability to pay $600.00. This court said:

> "To support such a judgment in contempt it is clear that it should first appear that the act sought to be coerced was yet within the power of the person proceeded against to perform. It would be repugnant to reason and futile to order a person imprisoned until he did some particular thing unless he had the present ability to do it."

In this case the defendant was a fry cook. The undisputed evidence shows that when working for wages he would earn less than $200.00 per month. Like many men, he was evidently dissatisfied with working for wages, and some time during the married life of plaintiff and defendant he went to work on a commission basis for Dee's Hamburgers, and there he made $800.00 per month. How long he worked the record is silent, but he evidently earned enough to obtain more than a $5,000.00 equity in a home. For some reason, on February 15, 1947, some twenty-seven days prior to the plaintiff commencing her original action of separate maintenance, he lost his job. There is no evidence in the record that he left Dee's Hamburgers in order to deprive his family of support. He went to Vernal, looked for work and could not find it. He came back to Salt Lake and associated himself with Mrs. Theo Carlson's business. His wife had the accumulation of their married life in her name—the home. In April, 1947, she sold this and realized $5,000.00 for it, and he knew it. The defendant was not faced with a proposition of accepting any low-paying job in order to keep and feed his wife and children. He had reason to believe and did believe that this $5,000.00 could keep them until he got on his feet financially. When parties are

married and living together, should the husband suffer financial reverses, should he lose a high-paying position and be obliged to accept a lower one, then, of course, the entire family must reconcile themselves to a lower standard of living and readjust their economic situation accordingly. Should the rule be different just because they are separated? It is a fact well known that once a man has tasted the high wages and high living standards that come with successful commission work or work for himself, he is loath indeed to go to work for wages. Many of our fortunes in this city were based upon the fact that some miner refused to work for wages, but starved through an unproductive lease until he struck it rich.

The plaintiff in this case had $5,000, enough money to keep herself and children in decent living conditions for over a year and until the defendant could rehabilitate himself. On July 15, 1947, the plaintiff and defendant entered into their stipulation whereby he agreed to pay $100.00 per month for the support and maintenance of the minor children at the rate of $25.00 per week. At that time the plaintiff did not seem to feel that she required $250.00 per month. On October 7th the decree was entered allowing $250.00 per month. The defendant stipulated to this. Why? you may ask. Every practicing attorney knows that case after case comes into his office where one spouse is so anxious to get rid of the other that he will sign any paper and agree to any conditions in order to rid himself of his mate, and, of course, in this case evidence was brought out at the hearing that the

defendant was advised by his former attorney to sign the stipulation, and that the amount would be cut down to a reasonable figure at a later date. There is no record in this appeal of what evidence was introduced at the default hearing on October 7th. Suffice it to say that the plaintiff knew that she had not received the $100.00 a month under the temporary order, and yet she asked for $250.00 in the default case on October 7, 1947. The writer wonders that had the lower court known on October 7, 1947, that the defendant had not paid the $100.00 per month as ordered on July 15, 1947, whether or not he would not have insisted on going into the financial ability of the defendant to pay $250.00 per month.

There is no evidence that the plaintiff demanded and insisted upon the payment of either the $100.00 per month under the July 15, 1947, order or the $250.00 per month under the October 7, 1947, decree prior to December 22, 1947, but that she came into court and asked that this defendant be found in contempt.

The court in his Finding No. 5 did not find that the defendant had earned enough to pay the $250.00 per month as provided in the decree, but he did make a finding that defendant has been and now is capable of earning a sufficient amount to provide a substantial sum for the support of his former wife and children, and that his earnings in the past had been as high as $800.00 as cook, and is still able with reasonable effort to earn sufficient to comply with the terms of the decree. Where is the evidence to substantiate that he could earn sufficient to

comply with the decree and pay $250.00 per month? Did the court feel that any fry cook at any time could get a job, or rather, let us say, a position, for $800.00 per month? If that were possible, I believe that even the ranks of the legal profession would become thinner on account of their becoming fry cooks, and we might even lose a few judges. Of course, there was no evidence to substantiate such a finding, and the only question involved is whether the defendant had wilfully placed himself in a position so as not to comply with the terms of the decree of October 7, 1947. There is absolutely no evidence to substantiate that.

The case of *Selph v. Selph* (Sup. Ct. Arizona, 1925), 231 P. 921, on page 922, states:

> "The law does not require impossibilities, but it does exact good faith and an honest and conscientious effort to perform its orders and decrees."

On page 923:

> "It has been held too that an inability to pay alimony brought about by the defendant's own act for the purpose of avoiding its payment may be punished for contempt."

The case at bar is similar in one respect to *Hall v. Hall* (Sup. Ct. Utah, March 3, 1947), 177 P. (2) 731—— U. ——. In that case it appears that the lower court found the defendant in contempt for failure to pay alimony. The parties had stipulated to $65.00 a month, and the court arbitrarily raised the amount to $80.00 per month. On the hearing for contempt, the court asked the defend-

ant if he had been able to pay the $80.00 per month, and the defendant stated that he had not. The court arbitrarily stated that there was no doubt in his mind but that the defendant could make these payments if he made up his mind to do it.

In the case at bar, the court's findings were equally arbitrary and were unsupported by the evidence.

In *Wohlfort v. Wohlfort* (Kans., 1924), 40 A.L.R. 538, 225 P. 746, on page 750, the court says:

> "In such a case, when the court makes a reasonable order, the amount of which the husband can pay out of his property or out of his earnings, the court has the power to commit him to jail for contempt if he willfully refuses to do so. But an order committing to jail is the exercise of the ultimate power of a court of equity, and the prudent chancellor is careful that there be no mistake in its use. It should be used only when it is clear (1) that the original order is reasonable, (2) that the husband is able to comply with it without undue hardship, and (3) that his refusal to comply with it is willful to such a degree as to be contumacious, amounting to contemptuous disobedience. When this situation is made clear, then the chancellor not only has the power, but it becomes his duty, to issue the commitment."

The defendant contends in the case at bar (1) that the original order in this case of $250.00 per month was unreasonable; (2) that the defendant was unable to comply with it at all; (3) that his refusal was not wilful at all and was not contumacious or contemptuous disobedience.

It must be borne in mind in this case that the order made after the hearing on December 22, 1947, was the first and only order to be made. The defendant could not complain of that portion of the order wherein he was to pay one-half of what he made after certain deductions. Such an order has been upheld in the case of *Wohlfort v. Wohlfort,* supra.

As to whether or not the court could have ordered the defendant to go and seek work at a place other than Mrs. Carlson's is in dispute with the authorities. In the case of *Messervy v. Messervy,* 67 SE 130, 30 LRAns 1001, the court held that it could not compel a husband who has no trade or profession or employment, to learn a trade, acquire a profession, or find employment, and, by exercise thereof, derive an income, to comply with the court's order to pay alimony to his wife, in a suit for her separate maintenance.

A contrary view is found in *Fowler v. Fowler,* 61 Okla. 280, 161 P. 227, LRA 1917C 89, which holds a man who has no money or tangible property may be adjudged in contempt of court in failing to pay alimony adjudged to be paid by him if he makes no honest effort, considering his mental and physical capabilities to work and earn money to pay the same.

The case of *Andrews v. McMahan* (New Mexico, 1938), 85 P. (2) 743, held that the district court erred in committing an unemployed, divorced husband for contempt in failing to pay his former wife the sums awarded by the divorce decree for the support of the minor child

and attorney's fees in the absence of a finding that he could find employment or had the pecuniary ability to pay the judgment, although the court found that he had the ability and strength to do certain kinds of work.

There was absolutely no evidence that the defendant Osmus could find employment at $800.00 a month, or in any sum exceeding $40.00 per week, and owing to the fact that the plaintiff had $5,000.00, there was no reason why the defendant should accept a job at $40.00 per week, which, if he turned over all of his wages to his wife, would still fall short of the amount ordered to be paid under the October 7, 1947, decree.

The defendant contends that the evidence wholly fails to substantiate the findings of the court in regard to his ability to pay and his ability to obtain work, and, therefore, it necessarily follows that the order of the court finding the defendant in contempt was wholly erroneous.

## POINT 2

## THE COURT ERRED IN ITS FAILURE TO MODIFY THE DECREE OF OCTOBER 7, 1947, IN RESPECT TO ALIMONY AND SUPPORT MONEY. (Assignments Nos. 2 and 4.)

The courts in Utah have held that to entitle a party to a modification of decree there must be a change in circumstances.

*Chaffee v. Chaffee,* 63 U. 261, 225 P. 76; *Carson v. Carson,* 87 U. 1, 47 P (2) 894; *Cody v.*

*Cody,* 47 U. 456, 467, 154 P. 952; *Rockwood v. Rockwood,* 65 U. 261, 236 P. 457.

In this case the decree had not become final. It was entered on October 7, 1947, and it was still in its interlocutory stage, and the court on its own motion may modify an interlocutory decree at any time before it becomes final, and when that is done, time for appeal commences to run from the date of entry of the new or modified decree.

*Salt Lake City v. Industrial Commission,* 82 U. 179, 22 P. (2) 1046.

This court has held, in the case of *Anderson v. Anderson,* —— U. ——, 172 P. (2) 132, the criterion for determination of support money is the need of the person supported and the defendant's ability to pay.

The proper procedure for the party who is unable to comply with the order for payment of alimony or support of minor children is to seek a modification of the order, not to resist its enforcement, thereby subjecting himself to contempt proceedings.

*Bailey v. Superior Court* (Calif., 1932) 11 P. (2) 865.

In the case at bar there are, of course, no changed conditions. The defendant was utterly unable to pay $250.00 per month on October 7, 1947, and his condition had not changed on December 22, 1947, when he was in court on his petition or application for modification. The lower court had its attention called to the fact that the decree of October 7, 1947, was excessive, that the defend-

ant could not possibly comply with its provisions. The court could, and should at that time, have modified the alimony and support money provision in the decree. As it is, the $250.00 per month, or that part of it that the defendant is unable to pay, is pyramiding each and every month, and, unless the defendant, by some miracle, obtains a large sum of money to pay off the judgment, he will have a financial millstone around his neck that will forever discourage him from working. The court did, in his order in the hearing of December 22, 1947, order the defendant to pay one-half of his earnings, less proper deductions, to apply on current and past obligations to the defendant; however, this order did not alter the $250.00 per month provision in the decree.

The excessive demands of plaintiff were certainly not based upon the defendant's ability to pay, but appear rather to have stemmed from her desire for vengeance or revenge on account of his association with another woman. The court should have modified the decree, taking into consideration the needs of the plaintiff and the ability to pay of the defendant. Unfortunately, in all of these cases the needs must always yield to the ability to pay. In almost every divorce, unless the parties are rich, there is some economic maladjustment, and both parties must bear this together. If the decree of October 7, 1947, had made a ridiculously small allotment of alimony and support money, say $5.00 to each person, then, of course, within the six months' period the plaintiff could have moved to have the decree modified and corrected, and so it necessarily follows that in this case

the court could and should have granted the defendant some relief.

## CONCLUSION

In conclusion, the defendant contends that there was absolutely no evidence brought forth at the hearing that he in any way had the ability between October 7, 1947, and December 22, 1947, to pay the defendant the $250.00 per month as provided in the divorce decree, and the defendant further contends that there was absolutely no evidence that he had by his own acts brought about his inability to pay the alimony and support money for the purpose of avoiding its payment, and that therefore the court's holding him in contempt should be set aside and the court's ruling reversed.

Defendant further contends that payment of $250.00 support money and alimony for a man in his circumstances and earning ability at this time is so excessive that the court's action in denying his application for modification was absolute error, and that this court should on its own motion reduce said amount or should remand the case for further testimony before the district court in order that the lower court can make an order based upon the plaintiff's needs and the defendant's ability to pay.

Respectfully submitted,

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